**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 9**

| | | |
|---|---|---|
| **SMYRNA READY MIX CONCRETE, LLC** | : | CASE NO. 09-CA-251578<br>09-CA-252487<br>09-CA-255573 |
| and | : | 09-CA-258273 |
| **GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS** | : | **RESPONDENT'S MOTION TO STRIKE AND ANSWERING BRIEF TO THE COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** |

Respectfully submitted,

/s/Tim K. Garrett

Tim K. Garrett (BPR# 012083)
Robert W. Horton (BPR# 017417)
Mary Leigh Pirtle (BPR# 022659)
Kimberly S. Veirs (BPR# 034811)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, Tennessee 37201
Ph: (615) 742-6200 / Fax: (615) 742-2799
tgarrett@bassberry.com
rhorton@bassberry.com
mpirtle@bassberry.com
kveirs@bassberry.com

Stephen A. Watring (0007761)
AUMAN, MAHAN & FURRY
110 N. Main St., Suite 1000
Dayton, Ohio 45402
Ph: (937) 223-6003 / Fax: (937) 223-8550
saw@amfdayton.com

*Attorneys for Respondent*

## TABLE OF CONTENTS

## I. Introduction

Pursuant to Section 102.46(d) of the National Labor Relations Board's Rules and Regulations, as amended, Respondent Smyrna Ready Mix Concrete, LLC ("SRM" or "Respondent") files this Motion to Strike and Answering Brief to the Cross-Exceptions Filed by the Counsel for the General Counsel ("the General Counsel") on November 9, 2020.

The General Counsel requests that the Board overturn the Administrative Law Judge's ("ALJ") Decision based on his inaccurate summaries and application of cases previously decided by the Board. Specifically, the General Counsel requests broadly and with no record evidence or sufficient legal precedent, that the Board should reverse the ALJ's finding that Ben Brooks ("Brooks") telling the Winchester drivers that they would no longer be required to drive to Florence violated the Act, and that the Board should find that the ALJ erred in failing to hold that Brooks paying the Winchester drivers $100 safety bonuses at a safety meeting violated Section 8(a)(3) of the Act in addition to Section 8(a)(1) of the Act. This contested conduct does not violate Section 8 of the Act. The General Counsel also argues that the ALJ erred by not subjecting Respondent to the draconian remedy of a public notice reading. There is no factual or legal basis upon which the Board should grant such a remedy in this case. The General Counsel's cross-exceptions should be dismissed.

## II. Motion to Strike

The General Counsel has failed to file cross-exceptions that are consistent with the Board's requirements set forth in 29 C.F.R. § 102.46(a)(1)(i)(C), which states that each exception **must** "provide precise citations of the portions of the record relied on." The General Counsel's exceptions should be "disregarded" in accordance with the rules because the General Counsel's failure here to provide the required precise citations unduly prejudices Respondent's ability to

provide a meaningful response. *See* 29 C.F.R. § 102.46(a)(1)(ii). In fact, the General Counsel's argument does not contain a *single* citation to the transcript or to any exhibits upon which the General Counsel relies. Rather, the General Counsel relies only on conclusory statements and argument without citing evidentiary support from the record. For these reasons, Respondent moves to strike the General Counsel's cross-exceptions.

## III. Argument

### A. The Administrative Law Judge correctly found that General Manager, Ben Brooks, telling employees that they would no longer be required to drive to Florence, KY is not a violation of the Act.

The ALJ correctly found that Brooks' statement to the Winchester Drivers that they would not have to drive to Florence as frequently as before was not a violation of the Act, and the record evidence confirms that Brooks' statement was premised upon the Company's hiring of additional drivers in Florence, not on Brooks' alleged awareness of a union meeting. (ALJD 20).[1] The ALJ correctly held that that there was no record evidence supporting a contrary result. For example, the ALJ held that the General Counsel did not present evidence that the Nicholasville or Georgetown drivers continued to travel to Florence just as frequently as before in order to establish a connection between Winchester's alleged union organizing and the cessation of Florence trips by Winchester drivers. (*Id*.).

In response to the ALJ's finding, the General Counsel argues (with no record citations) that Brooks "promis[ed] employees they would no longer be required" to drive to Florence, Kentucky, and that because the Winchester Drivers' frustrations with making Florence trips was the "genesis of the union organizing drive," Brooks' alleged promise would have been "effective at quelling unionization efforts." (General Counsel's Cross-Exceptions, "CE" pp. 2-3). As an initial point, the

[1] ALJ Amchan's Decision is cited herein as "ALJD____." References to the hearing transcripts in this matter will be cited as "Tr._____." References to Respondent's exhibits will be cited as "R. Ex. ____."

General Counsel's argument ignores the contrary testimony of Highley and several other Drivers, who admitted that Brooks did not promise the Drivers that they would never have to go to Florence. (Tr. 434, 559, 758). Further, the ALJ concluded that Florence was not the genesis of the campaign and instead determined that "much of the evidence regarding Florence is relevant to this only as background." (ALJD 8 n. 12). And, there is no record evidence to support the General Counsel's argument that "Brooks' "promise[d] to resolve that concern." (CE p. 3). Rather, Brooks stated only that the Florence Plant had hired more employees, the result of which meant that the Winchester drivers would have to go there less often to haul loads. (Tr. 758, 1111). The record is undisputed that Brooks had no control over hiring decisions at the Florence, Kentucky plant – that plant is outside of Brooks' Central Kentucky Region – and thus no such "promise" could have even been made. (Tr. 1076-1077, 1111).

The record evidence demonstrates both that the Drivers' complaints regarding trips to Florence had been received by Highley and communicated to Brooks and that the Florence location had hired more drivers, thereby reducing the need for support from Winchester Drivers, before the beginning of the nascent organizing campaign. Sheldon Walters testified that he communicated the issue to Highley and that Highley communicated the issue to Brooks on the phone in the presence of other drivers in October. (Tr. 490-92). Brooks informed the Drivers only that SRM had already hired additional Florence drivers – i.e., the conditions were already improved. (Tr. 758, 1111). This testimony is consistent with SRM's Truck Delivery Reports which demonstrate that at the time of the November 15th Driver/Safety Meeting, no Winchester driver had been to Florence since October 29th. (R. Exs. 74-75). The Winchester Drivers had not been sent to Florence for over a week before Respondent even allegedly knew of any organizing activity. (*Id.*). This record does not support the General Counsel's cross-exception.

Finally, the General Counsel argues that there is no evidence that Respondent actually hired additional employees in Florence, other than the "self-serving testimony of Brooks." (CE p. 4). But, that testimony is not contradicted by any evidence from the General Counsel, who bears the burden of proof. *See Real Foods Co*., 350 NLRB 309, 310 (2007) ("The General Counsel bears the burden of proving, by a preponderance of the evidence, that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation"). Neither the General Counsel nor the Union put forth any evidence to dispute Brooks' testimony or to demonstrate that Drivers from other plants were still making trips to Florence, while the Winchester drivers were not. This lack of contrary evidence renders the General Counsel's argument meritless. Further, the General Counsel argues that even if Respondent did hire additional employees in Florence, "doing so in order to remedy the employees' grievances at the Winchester plant and quash support for organizing violates the Act." (CE p. 4). However, again, this argument wholly ignores the evidence confirming that no Winchester driver had been to Florence since October 29th, over a week before Respondent allegedly knew of the Drivers' organizing activity. (R. Exs. 74-75). Brooks provided truthful and accurate information to the Winchester drivers at the safety meeting regarding something that had already occurred, and about something that Brooks had no control over, namely the hiring of more drives in Florence. His statement was accurate, and entirely lawful, and the ALJ correctly dismissed this claim.

### B. The Administrative Law Judge correctly found that Respondent's $100 Safety Bonus to Drivers did not violate Section 8(a)(3) of the Act.

The ALJ did not address whether Respondent violated Section 8(a)(3) of the Act by paying the Winchester drivers a $100 safety bonus at the November 15, 2019 safety meeting, presumably because there is no basis for liability on this claim. As Respondent argued in its Exceptions and

Brief in Support of Exceptions, the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act for this same conduct and disputes the same with regard to any claim of liability with respect to 8(a)(3). SRM will not repeat its 8(a)(1) argument here in full, but Respondent submits that for the same reasons stated previously, namely Respondent's past practice of paying cash bonuses to employees at safety meetings and the testimony from multiple witnesses confirming this past practice, there is no evidence to support the General Counsel's claim that Respondent violated 8(a)(3) of the Act in paying this bonus.

The General Counsel points to the cases of *Clock Electric*, 338 NLRB 806 (2003) and *Holly Farms Corp.,* 311 NLRB 273 (1993) in support of his position that Respondent's paying the Winchester drivers $100 safety bonuses at the November 2019 safety meeting violated Section 8(a)(3) of the Act. These two cases are wholly distinguishable from the present case.

In *Clock Electric*, Local 38 launched a union organizing campaign and the employer strongly opposed the union and maintained a list of its known or suspected employee supporters. *Clock Electric*, 338 NLRB at 807. The employer in *Clock Electric* then initiated discussions with two of the known or suspected union supporters about a pay raise soon after they signed union cards. *Id*. The Board found that the evidence warranted an inference that the wage increases to the two employees were meant to discourage their support of Local 38 because of the timing during the critical period – the employees had just expressed interest in collective-bargaining representation by signing authorization cards. *Id*. Further, the employer in *Clock Electric* was promoting an alternative union (CIU – Congress of Independent Unions), and the Board found the pay raises were linked to this promotion as a result of specific comments made by the employer that it was "not paying [the employee] all of this money not to show up at the [CIU] meetings." *Id*. at 806-808. In *Holly Farms Corp.,* the employer gave all employees a wage increase during a

union organizing campaign less than a month before a scheduled election and *after* the representation petition was reinstated. *Holly Farms Corp*., 311 NLRB at 274. In *Holly Farms Corp*, the Board stressed the timing of this wage increase and that it occurred during the union election campaign – i.e., during the critical period. *Id*.

The General Counsel has failed to address the critical distinction in the instant case as compared to *Clock Electric* and *Holly Farms Corp.* cases – at the time the $100 safety bonus was paid, SRM was not in the critical period. The "critical period" is a subject of well-established Board doctrine, and "begins on the date the petition is filed, and runs through the date of the election." *Mek Arden, LLC*, 365 NLRB No. 109 (July 25, 2017) citing *Ideal Electric and Mfg. Co.*, 134 NLRB 1275 (1961); *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Conduct occurring prior to the critical period is generally not considered objectionable unless it adds meaning and dimension to related post-petition conduct. *Ideal Electric and Mfg. Co.*, 134 NLRB 1275 (1965)*; Data Technology Corp*., 281 NLRB 1005, 1007 (1986); *Nat'l League of Prof'l Baseball Clubs*, 330 NLRB 670, 676 (2000). In this case, no petition was ever filed, no union authorization cards were collected, and in fact, from the Union's perspective, the Winchester Drivers were only in the initial committee building stage. (Tr. 404-405). On these facts, the Board's application of the analysis set forth in *Clock Electric* or *Holly Farms* would be in error.

Still further, the General Counsel's insistence that the Board use the *Wright Line* analysis here, despite the safety bonus payment occurring outside of the critical period, further undermines the General Counsel's argument that Respondent violated Section 8(a)(3). (CE p. 5). Under *Wright Line*, the General Counsel must prove by a preponderance of the evidence that the employees' union or other protected activity was a substantial or motivating factor in payment of the safety bonuses. *Wright Line*, 251 NLRB 1083, 1087 (1980), *enfd*. 662 F.2d 899 (1st Cir. 1981), cert.

denied 455 U.S. 989 (1982). "If the General Counsel makes the required initial showing, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's actual or suspected union or protected activity." *See Shamrock Foods Co*., 366 NLRB No. 117 (2018), at 26-27. Here, the General Counsel has not and cannot make this initial showing because there is not a shred of evidence to even infer that this bonus was offered to the Drivers to discourage union activities other than the Board's own misplaced conclusion. It is especially telling that not a single employee testified that he or she believed the bonus was given for this purpose.

Yet, even if the General Counsel could make the required initial showing under *Wright Line*, Respondent has established by a preponderance of evidence that it would have taken the same action in the absence of any actual or suspected union activity. SRM's accounting records undisputedly show that Brooks paid bonuses to employees on 11 occasions in 2019, both before and after the November 2019 safety meeting at Winchester. (Tr. 1111-1112, 1572; R. Ex. 91). The unrefuted record likewise demonstrates that SRM has paid cash bonuses to Drivers for over 20 years. (Tr. 1572-1575). This is hardly a new practice. Further, two witnesses, including one of the General Counsel's witnesses, Driver Sheldon Walters, testified that they had received the exact same $100 cash bonus from Brooks in the year prior to November 2019. (Tr. 508-510). There is simply no record evidence sufficient to indicate that SRM would not have taken the same action in the absence of alleged protected activity. There are no allegations of alleged union activity by the employees at the other plants to whom Brooks paid those bonuses, undermining any claimed inference that payment of the cash bonuses was meant to discourage union activity. The ALJ incorrectly found that Respondent violated Section 8(a)(1) with its payment of safety bonuses, and

the Board similarly should not find that Respondent violated Section 8(a)(3) with respect to the same established practice.

### C. The Administrative Law Judge correctly found that a notice reading is not warranted under the circumstances of this case.

There is absolutely no legal basis upon which the Administrative Law Judge could have found a notice reading to be necessary or appropriate in this case. Notably, the General Counsel cites to decades old case law in support of this cross-exception but ignores all recent case law that ***strongly criticizes*** the NLRB's public notice reading remedy for violating employers' First Amendment rights.

Several circuits, including the Sixth Circuit, have recently criticized and refused to enforce this draconian and extraordinary remedy, which would be "humiliating and degrading to the employer and undoubtedly would have a lingering effect on future relations between the company and the union." *HTH Corp. v. NLRB*, 823 F.3d 668, 675 (D.C. Cir. 2016). The Fifth Circuit ruled just this year, in refusing the enforcement of a public notice reading requirement, that such requirement mandates a "confession of sins" by an employer and "conjure[s] up the system of 'criticism-self-criticism' devised by Stalin and adopted by Mao" that was "incompatible with the democratic principles of the dignity of man." *Denton Cnty. Elec. Coop., Inc. v. NLRB*, 962 F.3d 161, 174 (5th Cir. 2020) (quoting *HTH Corp*., 823 F.3d at 677) (internal citations omitted)). Further, the Fifth Circuit in *Denton Cnty.* noted that such a remedy would be appropriate only "[f]or repeated violations persisted in despite intervening declarations of illegality" where "such conduct has created a chill atmosphere of fear." *Id*. (quoting *UNFW., Inc. v. NLRB*, 844 F.3d 451, 463 (5th Cir. 2016)). Here, the events leading up to this case all occurred in the scope of a two month period and any talk of union activity only occurred during a period of less than two weeks in November 2019. There is no evidence of any union activity in the approximately six weeks

between the Respondent receiving the first two ULP charges and the conversion of the Winchester Plaint to an on-demand facility. No General Counsel witness alleged that union or protected activity was occurring during this time. And, in fact, John Palmer testified that the union drive was "done" by the time the ULP charges had been filed with presumably no further organizing activity taking place that could have been opposed by Respondent. (Tr. 376). Further, prior to this case, SRM has never had an unfair labor practice charge filed against it for any reason, and certainly not by employees in its unionized facilities, and therefore, this remedy would be wholly inappropriate in this case. (Tr. 1557).

To the extent the General Counsel and/or the Union argue that opting for a Board agent to conduct the public notice reading would alleviate an employer's First Amendment concerns, (and the General Counsel proposed that option in its post-hearing brief to the ALJ in this case), the Sixth Circuit rejected that argument as recently as two months ago. The Sixth Circuit has held that such a remedy would "require named individuals…if still employed by [the employer]—to stand at attention as human demonstratives in the employer's confession of sins. And it runs headlong into the Supreme Court's recognition that compelled speech violations extend to situations 'where the complaining speaker's own message was affected by the speech it was forced to accommodate.'" *Sysco Grand Rapids, LLC v. Nat'l Labor Relations Bd.*, 825 F. App'x 348, 359 (6th Cir. 2020) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 49 (2006)). Respondent's actions in this case, a company with no history of any unfair labor practices (and in fact a history showing absolutely no union animus prior to the allegations here), certainly should not be subject to such an extraordinary remedy by the Board. Furthermore, given the Sixth Circuit's firm stance on this issue a mere two months ago, it is very unlikely that the Sixth Circuit

would enforce such a remedy in this case, and the ALJ did not err in failing to order such a draconian and extraordinary remedy.

## IV. Conclusion

For the foregoing reasons, SRM respectfully urges the Board to grant Respondent's Motion to Strike the General Counsel's cross-exceptions, or, in the alternative, reject the arguments raised by the General Counsel in his cross-exceptions and affirm the Administrative Law Judge's decision to the extent described above.

Respectfully submitted,

/s/Tim K. Garrett
Tim K. Garrett (BPR# 012083)
Robert W. Horton (BPR# 017417)
Mary Leigh Pirtle (BPR# 022659)
Kimberly S. Veirs (BPR# 034811)
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, Tennessee 37201
Ph: (615) 742-6200 / Fax: (615) 742-2799
tgarrett@bassberry.com
rhorton@bassberry.com
mpirtle@bassberry.com
kveirs@bassberry.com

Stephen A. Watring (0007761)
AUMAN, MAHAN & FURRY
110 N. Main St., Suite 1000
Dayton, Ohio 45402
Ph: (937) 223-6003 / Fax: (937) 223-8550
saw@amfdayton.com

*Attorneys for Respondent*

## CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of November, 2020, a copy of the foregoing was filed electronically with the NLRB and copies of same forwarded via e-mail to:

Zuzana Murarova
Counsel for General Counsel
NLRB, Region 9
Zuzana.murarova@nlrb.gov

David O'Brien Suetholz
Pamela M. Newport
davids@bsjfirm.com
pamelan@bsjfirm.com

/s/ Tim K. Garrett
Tim K. Garrett